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Supreme Court of the United States

October Term, 1951

No. 463

SUNBEAM CORPORATION
Petitioner

v.

CIVIL SERVICE EMPLOYEES
COOPERATIVE ASSOCIATION
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

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Copy of Opinion of Court of Appeals of November 1, 1951 38

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, SUNBEAM CORPORATION, Plaintiff in the District Court, Appellee below, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review a judgment of that Court entered on November 1, 1951.

The Court of Appeals first affirmed the decision of the District Court in favor of your Petitioner (reported 187 Fed. 2d. 768) but following the decision of this Court in the case of *Schwegmann Bros., et al. v. Calvert Distillers Corporation,* 341 U. S. 384, granted a rehearing and thereupon reversed the decision of the District Court. The second decision of the Court of Appeals is not yet reported. The first opinion appears at page 82 of the record and the second at page 120 of the record. A copy of the second decision is attached to the petition as an appendix.

I. STATEMENT

The proceeding in the District Court was a civil action brought by the Petitioner against the Respondent for an injunction against failure to maintain stipulated resale prices for Sunbeam household appliances set forth in resale price maintenance contracts between the Petitioner and its dealers in Pennsylvania. The Respondent was a non-signer.

The Respondent maintains a small retail establishment on Chestnut Street, Philadelphia, and the transactions involved are wholly intrastate and local in character.

Petitioner is the owner of the trademark "Sunbeam" and other trademarks under which it sells electric shavers, toasters, and other appliances, which marks are duly registered in the United States Patent Office. The Complaint alleges that it has established resale prices under the Pennsylvania Fair Trade Law and that the defendant refuses to abide by them, notwithstanding the provision of the Pennsylvania Fair Trade Law that it shall be binding upon non-signers.

The District Court held for the Plaintiff, the Petitioner here, and entered the injunction. The

Court of Appeals affirmed, 187 Fed. 2d. 768, record page 82 and following the decision of this Court in the Schwegmann cases reversed following a re-argument. (Record 120)

In its final decision, the Court of Appeals held that the local retail character of the trade involved was immaterial, that the Petitioner's price maintenance policy was interstate in character; therefore, the local nature of the trade involved was irrelevant. It thus denied the Commonwealth of Pennsylvania (and inferentially 44 other states) the right to exercise its police power through its Fair Trade law.

II. JURISDICTION

The jurisdiction of this Court is based on 28 U. S. Code, Sec. 1254 (1), Act of June 25, 1948, c. 646; 62 Stat. 928.

III. THE QUESTIONS PRESENTED

1. Does the Schwegmann case invalidating the enforcement of Fair Trade Laws against non-

signers under the Miller-Tydings Amendment apply to purely intrastate retail sales?

2. Is the Pennsylvania Fair Trade Act of June 5, 1935, P. L. 266, 73 Purd. Pa. Stat., Sec. 7-8, as amended, June 12, 1941, P. L. 128, enforcible in accordance with its terms against non-signers where purely intrastate commerce is involved as a valid exercise of state police power?

3. Does the fact that the Petitioner has similar resale price maintenance contracts under the Fair Trade Laws of other states render solely applicable the Miller-Tydings Amendment and render wholly inapplicable the non-signer provisions of the State Fair Trade Laws, particularly that of Pennsylvania?

4. Does the Petitioner have inherent rights in its registered trademark sufficient to prohibit the use thereof against its interest?

IV. REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals reversing its earlier decision in the same case is based solely on the Schwegmann case, which in fact is not an

authority for the Court's decision. The Court should allow the writ for the following reasons:

1. The *Schwegmann case (341 U. S. 384)* was pleaded and decided on the basis of alleged violation of the Miller-Tydings Amendment, which does not contain the non-signer clause. This case is based on the Pennsylvania Fair Trade Act, 1935 P. L. 266, as amended, 73 Purdon's Statutes 7-8, which does contain the non-signer clause. Furthermore, this case involves only intrastate commerce of very local character. Therefore, the decision of the Court of Appeals extends the Schwegmann case so as to invalidate the non-signer clause of the Pennsylvania statute. No such result is authorized by the Schwegmann case.

2. Since the sole authority given by the Court of Appeals is the Schwegmann case, it is therefore unsupported by authority and the case stands as an unwarranted interference with the local operation of the state statute.

3. The decision of the Court of Appeals is contrary to the case of *Old Dearborn Co. v. Seagram Corporation,* 299 U. S. 183 (1936). That decision was not reversed by the Schwegmann case or even mentioned in the majority opinion.

4. The questions involved are of major local importance and when taken with other like situa-

tions in other states are of great nation-wide importance because the decision denies to a state the exercise of its police power because 44 other states have exercised the same power.

V. CONCLUSION

It is of great importance to the manufacturers of trademarked merchandise and the many small merchants which sell their products that they be permitted to operate under a price maintenance plan in order that they may compete with the large chain stores and large local department stores. As the decision of the Court of Appeals now stands, the Pennsylvania Fair Trade Act is virtually abolished on the purported authority of the decision of this Court.

WHEREFORE, your Petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court on a day to be designated a full transcript of the record and proceedings of said Court in the case numbered and entitled on its docket as No 10,344, Sun-

beam Corporation, Plaintiff-Appellee, v. Civil Service Employees Cooperative Association, Defendant-Appellant, to the end that this case may be reviewed and determined by this Court; that the judgment of said Court of Appeals for the Third Circuit be reversed and that the Petitioner shall be granted such other and further relief as to this Honorable Court may seem meet and proper.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THE OPINIONS BELOW

The first opinion of the United States Court of Appeals for the Third Circuit in this case was decided March 20, 1951, and is reported at 187 Fed. 2d. 768.

The second decision is not yet reported but is printed as an appendix to the Petition.

The opinion of the District Court is not reported.

II. JURISDICTION

The Petition sets forth at page 3 the grounds upon which the jurisdiction of the Court is invoked.

III. STATEMENT OF THE CASE

The Petition sets forth, beginning at page 2 a statement of the case and at page 3 the questions presented.

IV. SPECIFICATION OF ERRORS

1. The Court of Appeals correctly decided the case in its first opinion and now commits error in that it considers its second decision compelled by the decision of this Court in the Schwegmann case.

2. The Court of Appeals committed error in that it disregards the local nature of the transactions sought to be enjoined solely because the Petitioner has lawful resale price maintenance contracts in other states.

3. The Court of Appeals refuses to recognize the right of Petitioner to restrict the use of its trademarks upon the resale of its merchandise.

V. ARGUMENT

1. THE SCHWEGMANN CASE DOES NOT CHANGE THE RESULTS IN THIS CASE

In the Schwegmann case, the Plaintiff pleaded the Miller-Tydings Act, relied upon it, and prayed for an injunction for the violation of it. The whole tenor of the Schwegmann case was based on transactions in interstate commerce. These circumstances are particularly adverted to by the Court

of Appeals in its decision in the Schwegmann case, reported at 184 Fed. 2d. 11, at page 13, where the Court states:

> "Appellants, on their part, point to the facts: that plaintiffs have expressly invoked the Miller-Tydings Act; that they have expressly alleged a plan of general interstate operation and activity, in control of price and restraint of trade; that they have tried the case below on the theory that interstate commerce was affected; and that they have, without distinction between interstate and intrastate sales, sought and obtained an injunction whose purpose and effect is to maintain the pattern of restraints on commerce between the states which the plan was designed to, and does, make effective."

The Court of Appeals regarded the Miller-Tydings Act as if it contained the non-signer clause. On that point, it was reversed by this Court. Since the case was pleaded and decided on an interstate basis, the effect of the holding clearly is that the Miller-Tydings Amendment may not be availed of in interstate transactions, against a non-signer.

This leaves entirely uncovered the facts of this case, which involve solely the operation of a retail establishment on Chestnut Street in Philadelphia.

Paragraph 10 of the Complaint in this case reads as follows:

> "10. From and after 1937, subsequent to the enactment of the Act of Congress of August 17, 1937, c. 690, Title VIII; 50 Stat. 693; 15 U.S.C. Section 1, as amended, known as the Miller Tydings Act and subsequent to the enactment of the Pennsylvania Fair Trade Act, the Act of June 5, 1935; P. L. 266, plaintiff entered into contracts with retail distributors of electrical appliances, machines, supplies and apparatus in the Commonwealth of Pennsylvania, whereby it was agreed that the said retailers would not advertise for sale, sell or resell any commodities within the terms of said agreements at prices less than the minimum prices set forth in a schedule of minimum prices attached thereto and made a part thereof or in supplemental schedules issued from time to time thereafter in pursuance of the Pennsylvania Fair Trade Act. A specimen copy of the said contract and the supplement currently in effect are attached . . . "

The first conclusion of law of the District Judge in this case reads as follows: (Record p. H)

> "The Fair Trade Law of the State of Pennsylvania, being the Act of 1935, P. L. 266, as

> amended, 1941 P. L. 128, 73 P. S. Sec. 7 and 8, is valid and subsisting and controls the acts of the defendant complained of in this case."

It is therefore abundantly clear that the transactions involved in this case were not interstate in character but were entirely local and the decision of the District Court and the first decision of the Court of Appeals were based entirely on the Pennsylvania statute which does contain the non-signer clause. TheMiller-Tydings Amendment was not involved. It follows that the decision of this Court in the Schwegmann case involving only the Miller-Tydings Amendment without the non-signer clause is not authority for the final decision of the Court of Appeals.

2. THE SCHWEGMANN CASE APPLIES ONLY TO MERCHANDISE AND NOT TO TRADEMARKS, TRADE NAMES, OR GOOD WILL

While the Schwegmann decision is based entirely on the Miller-Tydings Act, it is worth while to note what features of interstate commerce it purported to affect.

The Miller-Tydings Act rewrites Section I of the Sherman Act so that it reads in part: "Nothing

herein contained shall render illegal, *contracts or agreements* prescribing minimum prices for resale" of specified commodities when "*contracts or agreements* of that description are lawful as applied to intrastate transactions under local law."

The foregoing emphasis is taken from the opinion of this Court in the Schwegmann case. That decision goes on to hold that resale price maintenance agreements are not binding on non-signers because the Miller-Tydings Act did not contain the non-signers clause customary in state statutes. So far as it goes, that decision, if applicable to these transactions, is binding, but this Court at no point made the suggestion that it would be improper for the Sunbeam Corporation to place limits on the use of its trade names which are so closely allied with the good will it has developed over the years. The Sunbeam Corporation has abundantly demonstrated that it does not desire its good will to be subjected to the hazards of transactions conducted by the Respondent. Its witnesses testified as to the injurious consequences of sales by price cutters.

If the Respondent wants nothing more than to supply its deserving customers with merchandise, it can do this just as well without telling them they are getting Sunbeam merchandise as it could by advertising the name of "Sunbeam". In either

case the customers would get an article of equal quality and their wants would be satisfied.

Of course, the Respondent does not wish to conduct business in this way because it knows its customers are not so much interested in unbranded merchandise. The testimony shows that almost all the sales the Respondent makes are of branded merchandise. This shows that it wants to rely upon the established reputation for quality which a well-known name carries, without participating in the expense of maintaining either the quality or the name.

The Petitioner contends that the Respondent has no right to do this. It should be confined to a sale of merchandise on the basis of the merchandise alone unassisted by the sales appeal developed by the Sunbeam Corporation and its cooperating dealers.

The Respondent, in effect, is saying to the public: "Do not buy at Gimbels across the street. Go there and be educated about the manifold advantages of Sunbeam articles but come and buy them here and avoid the expense of the advertising and sales promotion which is largely responsible for your interest."

If the Respondent put an advertisement in the newspaper in the language quoted above, we ven-

ture to suggest that any court would enjoin the assault. Yet by its actions, by the insinuations of its sales people and by all its suggestions of return of profits it is doing the same thing but to a lesser degree because without the printed advertisement fewer people learn about the Respondent. However, to the extent that customers do learn about the opportunities of saving, the result is the same and the injury is proportionately as great as if the appeal had been made in print.

Beyond any doubt the conduct of the Respondent is a direct injury to the Petitioner and to its dealers. In all fairness, it ought to be stopped. The injury, of course, will stop if Sunbeam articles are sold with the names removed so that persons who get them do not have the assurance of quality which the "Sunbeam" name carries with it.

The trademark and trade name of the Sunbeam Corporation belong to it and it does not have to permit the use or misuse of its trademarks and trade names without its consent.

Old Dearborn Co. v. Seagram Corp., 299 U. S. 183 (1936)

This case was decided by this Court before the adoption of the Miller-Tydings Act, and it involved the Illinois statute.

This Court, in the dissenting opinion in the Schwegmann case, states that in the Old Dearborn case this Court "had held that the 'non-signer' provisions of the Illinois 'fair trade' statute did not violate the due process clause." The question of the validity of the non-signer clauses under the Miller-Tydings Act, of course, did not come up and was not involved.

In sustaining the non-signer clause under state law and under the Constitution, this Court states, at page 194:

> " * * * We are here dealing not with a commodity alone, but with a commodity plus the brand or trademark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trademark stands. Appellants own the commodity; they do not own the mark or the good will that the mark symbolizes. And good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trademarks, labels and brands, are legitimate aids to the creation or enlargement of such good will. It is well set-

tled that the proprietor of the good will 'is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trademark without his consent and authority.' * * * The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Section 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates 'unfair competition.' * * * There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end."

The foregoing decision is not even mentioned in the majority opinion of this Court in the Schwegmann case and it may, therefore, be fairly assumed that it is not modified or reversed by that decision and there is no other decision in this Court which in any way detracts from the validity of the foregoing quotations as presently representing the ideas of this Court.

The Old Dearborn case is a clear and valid decision that when a merchant sells an article, he does not sell his trademark or good will. He sells the property. The Illinois statute contained the non-signer provision. The appellant signed a contract but asserted that for some reason, not entirely explained, it was invalid. This Court assumed that it was invalid and, therefore, considered the applicability of the non-signer provision. At page 188, this Court states:

> "The Illinois statute constitutes a legislative recognition of a rule which had been accepted by many of the state courts as valid at common law. This rule was based upon the distinction found to exist between articles of trade put out by the manufacturer or producer under, and identified by, patent, copyright, trademark, brand, or similar device, and articles of like character put out by others and not so identified. * * * "

This Court then goes on to state that insofar as the fixing of resale prices by agreement was concerned, the right, whether by common law or by statute, was upset by the Dr. Miles case.

The present position of the Petitioner, however, is that the Petitioner has the right to prohibit the Respondent from using the Sunbeam trademarks under any circumstances. It may be that the resale price maintenance contracts are not binding on third parties under the Schwegmann case, but the balance of the quotation still applies, that there is a distinction between articles put out under a trade name and those not. It is submitted that it is proper for this Petitioner to refuse authorization to the Respondent to resell its products under any circumstances when associated with the trademark or trade name.

If the Sunbeam Corporation had sold its articles to the Respondent, it might be this would carry with it an implied authority to resell them. It is important to notice, however, that such is not the case here. The Sunbeam Corporation did not sell these articles to the Respondent and has done everything in its power to prevent the Respondent from becoming a dealer under its price cutting scheme. In view of the fact that all distributors and dealers in fair trade states who will be supplied in the future will be bound by express con-

tracts which are binding, it is clear that if the Respondent ever secures any more Sunbeam articles, it can get them only from or through someone who violates an express contract with the Sunbeam Corporation.

The sales program of the Sunbeam Corporation before the Schwegmann case, and now after it, leaves no room for doubt that it does not consent to the use of its trade names by the Respondent. Having the right for justifiable reasons to withhold this consent, the Respondent should be enjoined from making unauthorized use of the Sunbeam trademarks and trade names.

On this theory, the only change which need be made in the decree of the court below is a modification to prohibit the sale of Sunbeam articles under the Sunbeam trade names under any circumstances.

There are two methods of merchandising so-called "over the counter" merchandise generally employed in the United States which particularly apply to the sale of household appliances such as are manufactured by the Sunbeam Corporation.

The first method and the method employed by the Sunbeam Corporation is to manufacture and sell the articles under the manufacturer's own trademarks, trade names and reputation. These

are widely advertised by the manufacturer and the buyer purchases largely on the faith of the manufacturer's reputation. Thus, any small store can display and sell an electric iron or other appliance of first-class character with customer acceptance as good as any on the market. This is a valuable circumstance.

The other method is based on the reputation of the store. It is followed principally by the large chain stores or department stores and mail order houses which often procure the manufacture of similar competing articles for themselves which are sold under their own brand name and sometimes without any name at all. In this type of merchandising the article is sold on the reputation of the store which makes the sale.

The major portion of the retail business of the Country is done by 400 large chain stores, mail order houses and large department stores, and the balance through some 1,700,000 small retail establishments, which are quite unable to finance the marketing of house brands. Such small establishments, particularly in the case of consumer durable merchandise such as that manufactured by Sunbeam, do not have the necessary reputation to convince a buyer of the quality of the article being purchased. For such a merchant to sell an article

of quality it must be accompanied by the reputation of the manufacturer.

The large stores, particularly the chain stores, can maintain uniform prices even on a nation-wide basis. Certainly they can do so over a large area. In 1951, Sears Roebuck maintained uniform prices on over $2,000,000,000 of merchandise, Macy's of $360,000,000 of merchandise, Sunbeam, on the other hand, produced (at retail fair trade prices) only $134,000,000 of merchandise. The small store proprietor has no such facility and obviously cannot sell his merchandise if his neighbor can sell it at a lower price, nor can he sell it if his customer can read in a newspaper that in a neighboring community the same article can be bought at a substantially lesser price.

For this reason, the small merchant depends on the umbrella of established retail prices. In almost all cases, he wants them. Only occasionally is there a rebel who wishes to cash in on the good will built up by all the others and secure for himself the sales which his neighbors would normally make.

The price-cutter cannot function as a price-cutter unless the article he sells has a recognized price and unless the merchandise upon which he cuts the price is identified by trademark or trade name.

If the courts should decide that the state Fair Trade Laws have in effect been abolished by the

Schwegmann case, then the sole recourse of the manufacturer who supplies the small retail merchant is to withhold the use of his trade name from the price-cutter. The use of the trade name is vital to the price-cutter. He does little damage unless he displays it and advertises it along with his reduced price.

His conduct in this respect ruins the small merchant's chance of selling recognized merchandise at a profitable price.

It is the contention of the Petitioner that it should have the right to withhold the use of its trademark from one who insists upon disrupting its merchandising plan and that of the great bulk of its retail dealers. The Court of Appeals considers this proposition breath-taking. It is, however, recognized by the Fair Trade Laws in forty-five of the states which permit an injunction against the price-cutter.

If it is the purpose of this Court to invalidate those state laws, except in the extremely unusual case when an article manufactured from local materials only, is sold only in the state where manufactured, then it is submitted that the trade mark rights referred to in the Old Dearborn case described above could be recognized.

3. THE TRANSACTIONS OF THE APPELLANT ARE NOT INTERSTATE COMMERCE AND THEREFORE ARE NOT AFFECTED BY THE SCHWEGMANN CASE

It is to be noticed that the decision of this Court in the Schwegmann case dealt only with the Miller-Tydings Act, and only with interstate commerce. The Sunbeam articles are made in Chicago, outside of Pennsylvania and shipped into Pennsylvania to distributors who are now bound by express resale price maintenance contracts which are binding. They are not shipped with the intention that any of them should reach the Respondent and if any of them do, it will presumably be by virtue of inducement on the Respondent's part to someone to violate his express contract.

It is quite impossible under these circumstances to assert that there is a continuous channel of commerce from the factory outside the state to the Respondent's store on Chestnut Street, and its customers who purchase there. The chain of commerce in these last two steps including the Respondent and its customers is wholly unintended by Sunbeam Corporation. Any movement of the goods pursuant to the Respondent's desire is initiated by some act, indeed by some wrongful act

on the part of the Respondent to which Sunbeam Corporation is not a party. Such transactions do not participate in the interstate character of the original shipments but are entirely new and original transactions which take place at whatever place they occur. So far as this record shows, they all occurred in Pennsylvania. The only sources of supply which the Respondent was willing to disclose were extremely local in character.

C. S. Smith, etc. v. Food & Grocery Bureau, 33 Fed. Supp. 539 (1939), D. C. Calif.

This was an action by a plaintiff for injunctive relief and for damages in violation of the Anti-Trust Act in fixing prices. The defendant moved to dismiss the complaint and the motion was granted without leave to amend. At page 540, the District Court Judge states:

> "Assuming that some of the products on its shelves are imported from other states, the moment they reach its shelves, they come to rest and cease to be 'in the flow' of interstate commerce. Schechter Poultry Corp. v. United States, 1935, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947; Southern Pac. Co. v. Gallagher, 1938, 306 U. S. 167, 59 S. Ct. 389, 83 L. Ed. 586.

> "As they are not subject to regulation by the Congress in that condition, they are not within the contemplation of the Sherman Anti-Trust law, 15 U. S. C. A. Sections 1-7, 15 note, or any other anti-trust statute aiming to prohibit certain practices in interstate commerce.
>
> "The activities of the defendants, complained of by the plaintiff, are limited to merchandise of the plaintiff *after it comes to rest.* They are not even state-wide, but are limited to six southern counties of California."

This language describes the situation here. Not only have the Sunbeam articles come to rest in Pennsylvania before the Respondent ever got hold of them, but it was clearly never the intention of Sunbeam Corporation that the Respondent should ever have them. Any supply which generated anywhere in the direction of the Respondent was an idea of its own and distinctly a new journey. Since the only sources it mentions are quite local it is not within the realm of possibility that any of the occurrences referred to in this lawsuit are interstate in character. Therefore, the Schwegmann case does not apply to them. They are controlled by the Pennsylvania Fair Trade Act which does have the non-signer clause and the Respondent is bound by the full terms of the original injunction.

Therefore, the injunction should stand in its original form.

Spencer v. Sun Oil Co., 94 Fed. Supp. 408 (1950) D. C. Conn.

This was an anti-trust action by gasoline dealers against the Sun Oil Company, for alleged violation of the Robinson-Patman Act. There were also individual defendants consisting of retail dealers. The question was whether or not the business consisted of interstate commerce. It was held that when the Sun Oil Company sold oil to its dealers, the entire transaction comprised interstate commerce, notwithstanding the oil came to rest in tanks in Connecticut, since the oil came entirely from outside the state. However, the court goes on to say that the retailers themselves and their transactions do not consist of interstate commerce; therefore, they may not be enjoined under the Robinson-Patman Act.

At page 411, the court states:

> "The question of whether the retail sales by the individual dealers to their customers constitutes interstate commerce involves other considerations. The moment the gasoline is delivered to the dealer's filling-station, title thereto passes to him. As an independent mer-

chant, he has complete control over the process of merchandising. He is in much the same position as a retail grocer, some of whose products are derived from outside the state; such a merchant is not engaged in interstate commerce because the moment the products reach his shelves 'they come to rest and cease to be "in the flow" of interstate commerce'. Smith Metropolitan Market Co. v. Food and Grocery Bureau of Southern California, D. C., 1939, 33 F. Supp. 539, 540: A. L. A. Shechter Poultry Corp v. U. S. 1935, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570. The retail sales of gasoline are transactions consummated locally, involving a commodity which had been previously siphoned off from the current of commerce and brought to rest within the state. Mid-Continent Petroleum Corp. v. Keen, 8 Cir., 1946, 157 F. 2d 310. These transactions are intrastate in nature and not within the purview of the Robinson-Patman Act."

Brosious v. Pepsi-Cola, 155 Fed. Supp. 99 (1946) C.C.A. 3

This was an anti-trust action for alleged violations of the Anti-Trust Act. The complaint was dismissed on the ground that the transactions com-

plained of were not in interstate commerce. This decision was affirmed by the Circuit Court of Appeals for the Third Circuit, stating at page 103:

> "It has been stated that interstate commerce terminates at a point where the parties concerned intended that it should end, i.e., it ceases at the point of its destination and has been delivered to the consignee. See Danciger v. Cooley, 1919, 248 U. S. 319, 39 S. Ct. 119, 63 L. Ed. 266; Binderup v. Pathe Exch., 1923, 263 U. S. 291, 44 S. Ct. 96, 68 L. Ed. 308. When a substance is transported from one state into another, the interstate movement ends with the delivery of that substance to a distributing company. Subsequent sales and deliveries to customers of such company constitute intrastate commerce. East Ohio Gas Co. v. Tax Comm., 1931, 283 U. S. 465, 471, 51 S. Ct. 499, 75 L. Ed. 1171; State v. Bartles Oil Co., 1916, 132 Minn. 138, 155 N. W. 1035, L. R. A. 1916D, 193. Also, see 'original package' cases, People ex rel. Burke v. Wells, 1908, 208 U. S. 14, 28 S. Ct., 193, 52 L. Ed. 370; State v. C. C. Taft Co., 1920, 183 Iowa 548, 167 N. W. 467, 9 A. L. R. 390, writ of error dismissed in 252 U. S. 569, 40 S. Ct. 345, 64 L. Ed. 720; Baltimore & O. R. Co. v. United States, D. C.,

N. Y., 1936, 15 F. Supp. 674. See Rottschaffer on Constitutional Law p. 321."

and at page 104:

"We hold that the transactions complained of in the instant case were not in interstate commerce, that they did not illegally restrain or restrict trade, or tend to create monopoly, that there was no illegal agreement between defendants, and that defendants committed no acts in the nature of a conspiracy to violate the anti-trust or other laws. Taken as a whole the action appears to be based upon a private controversy rather than upon one affecting the public as such, a necessary element of the laws which are herein attempted to be invoked."

General Tobacco & Grocery Co. v. Fleming, 125 F. (2d) 596 (1942) C.C.A. 6

This was a petition under the Wage and Hour Law and it was held by the court that the defendant's business did not involve interstate commerce, and therefore the Act did not apply. The defendant's business was the conduct of a grocery and tobacco business at wholesale. Some of the goods came from outside the state.

At page 601, the court states:

"* * * From the description of the conduct of its business detailed in its answer, the appellant was, in no particular, engaged in interstate commerce or in the production of goods for interstate commerce.

* * *

"As was said in Schechter Poultry Corporation v. United States, 295 U. S. 495, 543, 55 S. Ct. 837, 849, 79 L. Ed. 1570, 97 A. L. R. 947: 'The mere fact that there may be a constant flow of commodities into a state does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased.' * * * "

Jacobson Bros. Exquisite Footwear, Inc. v. Relda Fine Shoes, Inc., 199 N. Y. Misc. 820, June 13, 1951

This case was recently decided by the Supreme Court of Bronx County of the State of New York. Special Term.

EDER, J.: (In full text) On settlement of decision and judgment. The action herein was brought

pursuant to section 369-a *et seq.* of the General Business Law (Feld-Crawford Fair Trade Act), which relates to intrastate commerce. *Schwegmann Bros. v. Calvert Distillers Corp.* (341 U. S. 384) is clearly distinguishable. It is clear therefrom that it is without application or governing effect here. That case involved the Miller-Tydings Enabling Act (U. S. Code, tit. 15, sec. 1) and relates to *interstate* commerce. This action at bar involves intrastate transactions. The *Schwegmann* case ruling is applicable to and affects only interstate transactions in an action by a producer against a local retailer. In the instant case both parties were local retailers and the transactions were entirely local. Moreover, there is no evidence in the record that interstate commerce was involved; neither 'implication' nor 'inference' may be invoked in that regard. The court sees no ground for reconsideration of its decision because of the ruling in the *Schwegmann* case.

Decision and judgment signed.

Schechter Corp. v. U. S., 295 U. S. 495 (1934)

At page 546, this Court states:

"In determining how far the federal government may go in controlling intrastate

> transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. * * * But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government."

This Court concluded by holding that the Schechter poultry business did not involve interstate commerce nor did it sufficiently affect commerce for the act involved to apply.

Nebbia v. New York, 291 U. S. 502 (1933)

This case involved the price maintenance regulations of the New York Milk Control Board. At page 526 this Court states.

"Laws passed for the suppression of immorality, in the interest of health, **to secure fair trade practices,** and to safeguard the interests of depositors in banks, have been found consistent with due process. These measures not only affected the use of private property, but also interfered with the right of private contract. Other instances are numerous where valid regulation has restricted the right of contract, while less directly affecting property rights." (Emphasis added.)

Page 529:

"Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another, by giving trade inducements to purchasers, and by other forms of price discrimination. The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees. * * * "

and at page 530:

> " * * * In the light of the facts the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk."

It is inconceivable that the control of milk in New York State affected interstate commerce less than this defendant's business on Chestnut Street does. If it had materially affected interstate commerce, of course the New York State Law could not have stood.

The Preamble of the Pennsylvania Fair Trade Act, 1935 P. L. 266; 73 P. S. 7, reads as follows:

> "To protect trademark owners, distributors and the public against injuries and uneconomic practices in the distribution of articles of standard quality under a distinguished trademark, brand or name."

The purpose expressed in this Preamble is within the objects outlined in the Nebbia case and it is submitted that it is entirely proper that these statutory objectives should be carried out in intrastate commerce in accordance with the Pennsyl-

Supreme Court
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CHARLES ELMORE CRO

IN THE

Supreme Court of the United States

October Term, 1951.

No. 463.

SUNBEAM CORPORATION,
Petitioner,

v.

CIVIL SERVICE EMPLOYEES COOPERATIVE ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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facturer's representatives, are such transactions within the scope of interstate commerce and subject to the restrictive provisions of the Sherman Act as amended?

2. Are the issues in this case determined by the decisions of this Court in *Schwegmann Brothers v. Calvert Distillers Corp.* and *Sunbeam Corporation v. S. A. Wentling,* holding minimum resale price fixing agreements unenforceable against "non-signers".

STATUTES INVOLVED.

Miller-Tydings amendment to the Sherman Act, 50 Stat. 693; 15 U. S. C. A. #1.

Pennsylvania Fair Trade Act, June 5, 1935, P. L. 266, as amended by the Act of June 12, 1941, P. L. 128; 73 Purdon Pennsylvania Statutes, Sec. 7-8.

STATEMENT OF THE CASE.

The petitioner at page 2 summarizes the relevant facts in the case but understates the nationwide scope of petitioner's activities.

Sunbeam products are nationally advertised and distributed to wholesalers and retailers throughout the nation under the supervision of petitioner's representatives. Its price fixing activities are nationwide.

The Court of Appeals stated in its final decision that it was the interstate character of Sunbeam's commerce that is crucial not merely its nationwide price fixing scheme.

ARGUMENT.

Petitioner Is Not Entitled to Injunctive Relief Under the "Non-Signer" Clause of the Pennsylvania Fair Trade Act Where the Scope of Its Activities Are Nationwide and Interstate Commerce Is Involved.

The history of the development of minimum resale price fixing agreements within the scope of so-called Fair Trade Acts enacted by the legislatures of most of the states as well as the enactment of the Miller-Tydings amendment to the Sherman Act is well known to this Court.

There is no valid basis for distinguishing the facts or the issues in the present case from the facts and issues presented to this Court in the cases of *Schwegmann Bros. v. Calvert Distillers Corp.*, reported in 341 U. S. 384; and *Sunbeam Corporation v. S. A. Wentling,* reported in 341 U. S. 944.

The argument of petitioner that the decision in the *Schwegmann* case does not apply to its activities because they are intrastate only was also advanced when the *Schwegmann* case was before the Court of Appeals for the fifth circuit, and the issue was, therefore, before this Court.

The issues in both cases are identical in that the products were manufactured out of the state, Sunbeam products in Illinois and Calvert-Seagram products in New York, and were shipped into the state and distributed through distributors, wholesalers and retailers within the state. Both companies maintained a national organization, participated in nationwide advertising, supervised the distribution of its products in the various states, and supervised and promoted the enforcement of its minimum resale price maintenance scheme throughout the nation from its home office.

In the *Schwegmann* case, the manufacturers took the position that the sales sought to be enjoined were wholly intra-state sales and, therefore, beyond the scope of the Sherman Act. They admitted that they operate on a nationwide scope and functioned in interstate commerce.

vania Act whether or not the defendant is a party to a Fair Trade contract.

The milk control laws of the various states are based on the police power of the states. Likewise, the Pennsylvania Fair Trade Act and the similar statutes adopted in forty-four other states are based on the police power of those states.

The Preamble of the Pennsylvania Act clearly states that it is to protect trademark owners, distributors, and the public against injuries and uneconomic practices. This is exactly the same object, the protection of which was sought by the New York milk control law referred to in the Nebbia case and in the similar laws now in force in many states.

There is no reason why the Commonwealth of Pennsylvania should be denied the right to control destructive merchandising practices in department store merchandise than there is for denying it the right to control destructive practices in the milk trade.

VI. CONCLUSION

It is respectfully submitted that the Court of Appeals was mistaken in believing that the Schwegmann case controlled this case. It is further submitted that considered independently the decision of the District Court should be affirmed and the Petition should be granted for the reasons above set forth.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,344

SUNBEAM CORPORATION
v.
CIVIL SERVICE EMPLOYEES' CO-OPERATIVE ASSOCIATION,
Appellant

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Reargued October 15, 1951
Before MARIS, GOODRICH and KALODNER, *Circuit Judges.*

OPINION OF THE COURT

(Filed November 1, 1951)

By GOODRICH, *Circuit Judge*

This case, like the companion litigation in Sunbeam Corporation v. S. A. Wentling, (opinion filed herewith), makes its second appearance in this Court following the Supreme Court decision in

Schwegmann Brothers v. Calvert Distiller's Corp., 341 U.S. 384 (1951). Our earlier decision is reported in 187 F. 2d 768.

We need not repeat here what was said in the earlier discussion nor what has been said in the companion case to which reference has just been made. The only new point we have in this case, that Sunbeam urges strongly, is that the defendant association conducts only local business and, therefore, its sales are all intra-state. Since they are intra-state, the argument runs, Congressional action or inaction has nothing to do with the situation and the state fair trade law controls. Since the state fair trade law imposes the obligation to maintain prices upon non-signers as well as upon signers, the defendant association must, therefore, be enjoined from violating the state law. It is argued that even if goods come from without the state, when they have come to rest here they are no longer in interstate commerce and are, therefore, subject to the state law in every respect. Many decisions are cited to this effect including our well-known friend, Schechter Corp. v. United States, 295 U. S. 495 (1935).

One of the troubles with this argument is that it is directly contrary to the result reached by the Supreme Court in Schwegmann Brothers v. Calvert Distiller's Corp. There the whiskey was man-

ufactured in Maryland and was sent to distributors in Louisiana. These distributors sold some of it to retailers in Louisiana among whom were Schwegmann Brothers. They sold the liquor in their store to local buyers. Where the consumption took place we do not know but at any rate the local retail sales were in Louisiana. Those are the same facts as found in the present case. If the fair trade acts do not help Calvert to maintain the retail prices on whiskey in over-the-counter sales in Louisiana, they certainly cannot help Sunbeam to maintain the price of razors in over-the-counter sales in Philadelphia.[1]

The reason is clear. It is the interstate character of Sunbeam's commerce that is crucial and governing for it is Sunbeam's price fixing scheme which constitutes a trade restraint. This is the plan Sunbeam seeks to make nationwide by enforcing the non-signer provisions of local law in each of the states where a fair trade act has been established. This marketing plan is quite similar to the one struck down by the Supreme Court in Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373 (1911), where the pressure was applied against local stores making local sales.

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1. In all material respects, the Louisiana statute involved in the Schwegmann case is similar to the Pennsylvania statute involved here. See La. Gen. Stat., §§ 9809.1 *et seq.*, and Act of June 5, 1935, P. L. 266, §§ 1-5, as amended, 73 Purdon's Pa. Stats. Ann. §§ 7-10.

The judgment of the District Court is reversed and the case remanded with direction to enter judgment for the defendant.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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IN THE

Supreme Court of the United States.

October Term, 1951.

No. 463.

SUNBEAM CORPORATION,
Petitioner,

v.

CIVIL SERVICE EMPLOYEES COOPERATIVE ASSOCIATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The Opinion of the Court of Appeals reversing the judgment of the District Court and remanding the case with direction to enter judgment for the respondent is not yet reported, but is printed as an appendix to the Petition for Writ of Certiorari.

JURISDICTION.

The jurisdictional requisites are adequately set forth at page 3 of the Petition.

QUESTIONS PRESENTED.

1. Where the products of a manufacturer are nationally advertised and distributed nationally through wholesalers and retailers, under the supervision of the manu-

The Court of Appeals in an Opinion by Chief Judge Hutcheson disposed of this contention as follows (page 13):

> "We agree with appellants that though the sales made by appellants were made intrastate the transactions, the subject of this suit, so affect interstate commerce and the exertion of the power of Congress over it as to bring plaintiffs' activities within the reach of the Sherman Act, unless the Miller-Tydings Amendment to that act excludes them."

The decision was reversed on the question of whether the Miller-Tydings Amendment removed the Sherman Act restrictions on price maintenance contracts which are valid according to the law of a state and binding alike upon signers and non-signers.

In the case of *Sunbeam Corporation v. S. A. Wentling,* reported in 341 U. S. 944, this Court in a per curiam opinion granted the petition of the defendant for certiorari, vacated the judgment of the Court of Appeals for the third circuit and remanded the case for reconsideration in the light of *Schwegmann Brothers v. Calvert Distillers Corp.*

This case was reargued before the Court of Appeals on October 15, 1951, following which the Court filed an Opinion on November 1, 1951, reversing the judgment of the District Court. This decision has not been reported and a copy thereof is attached to this brief as an Appendix.

Both of these *Sunbeam Corporation* cases were before the Court of Appeals for the third circuit and involved enforcement of the Pennsylvania Fair Trade Act against non-signers. The *Wentling* case originated in the United States District Court at Harrisburg and the *Civil Service Employees Co-op* case in the United States District Court at Philadelphia.

In both cases Sunbeam Corp. was awarded an injunction in the lower court, which was affirmed by the Court of Appeals and subsequently reargued and reversed following the decision of this Court in the *Schwegmann* and the *Sunbeam-Wentling* cases.

Petitioner next contends that sales of its products below the established minimum resale prices causes damage to its valuable trade-mark rights and should for that reason be prevented by law. This argument was advanced by this petitioner in the Court of Appeals upon reargument in the *Sunbeam-Wentling* case and is answered by Judge Goodrich at page 3 of the Opinion. (See Appendix.)

> "It would indeed be a remarkable result to reach in a competitive economy if we were to say that a manufacturer could make everyone submit to the price he imposes upon sales to the consumer. Even a contract to maintain prices was unlawful prior to the Millard-Tydings amendment to the Sherman Act as the famous Dr. Miles and Hartman decisions show. To the extent that a manufacturer can get the same result without contract because of some theory of trade-mark protection, competition at the retail level in the sale of trade-marked goods is obviously going to be very much lessened."

Petitioner's final argument is that all distributors and dealers in fair trade states who will be supplied in the future will be bound by express contracts which are binding and if respondent ever secures any more Sunbeam articles, it can get them only from or through someone who violates an express contract with the Sunbeam Corporation (Petitioner's Brief pp. 19-20).

Petitioner upon reargument before the Court of Appeals stated in its brief that since the decision in the *Schwegmann* case had been handed down it had procured in excess of 80,000 signed minimum resale price agreements from dealers in Sunbeam products.

Petitioner in the belief that it has found a loophole in the *Schwegmann* decision has conspired with its distributors and wholesalers to refuse Sunbeam products to any retailer unless that dealer also sign a similar agreement.

It is a well known fact in the Philadelphia marketing area that a dealer is now coerced and forced into signing

a so-called Fair Trade agreement in order to obtain Sunbeam products and it is obvious that this illegal marketing scheme will be the subject of further litigation.

In the case of *Kiefer-Steward Co. v. Joseph Seagram & Sons,* reported in 340 U. S. 211, this Court stated at page 213:

> "We reaffirm what we said in United States vs. Socony-Vacuum Oil Co., 310 U. S. 150, 223: 'Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.'"

CONCLUSION.

The Court of Appeals for the third circuit has properly disposed of the issues involved in this case in the light of *Schwegmann Brothers v. Calvert Distillers Corporation* and the petition for certiorari should be denied.

Respectfully submitted,

DELBERT T. KIRK,
Attorney for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,280

Sunbeam Corporation

v.

S. A. Wentling,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Reargued October 15, 1951

Before MARIS, GOODRICH and KALODNER, *Circuit Judges.*

OPINION OF THE COURT
(Filed November 1, 1951)

By GOODRICH, *Circuit Judge*

This case is before us for the second time. It was previously reported in 185 F. 2d 903 and the opinion there gives the background of the case. It is here again because of the Supreme Court decision in Schwegmann Brothers v. Calvert Distiller's Corp., 341 U. S. 384 (1951). That decision held that a retailer who did not sign a contract for price maintenance is not to be subjected to the schedule of a price maintenance plan. In our former decision we denied Sunbeam protection against Wentling in interstate sales but did affirm the granting of the injunction against intra-state sales at less than the price Sunbeam had fixed.

It is now clear in view of the Supreme Court decision that even when we cut down the protection Sunbeam wanted we still gave it more than it should have had. The Supreme Court's conclusion is perfectly clear. One who does not sign a price maintenance contract cannot be subjected to the non-signer provisions of a state fair trade law where interstate commerce is involved. So it would seem, then, that Sunbeam is entitled to no protection at all against Wentling, a non-signer.

But Sunbeam comes into court upon rehearing with a second string to its bow. It says that it has valuable trade-mark rights in its razors. It sells these razors through retailers a large number of whom have signed price maintenance contracts. These retailers have to spend a large percentage of their gross receipts in selling costs. If merchandise is sold at a lower price than these retailers can afford to sell they cannot compete successfully against the price cutters and will turn to someone else's razors instead of selling Sunbeam Shave-masters. This is an injury, it is argued, to Sunbeam's trade-mark and should be prevented by law.

The consequences of accepting the argument almost take one's breath away. It is perfectly true that a trade-mark is entitled to protection. Nor does it require any fair trade act to give such protection.

For instance, if Wentling sold his own or someone else's razors as those of Sunbeam he would be in trouble. One of the best established forms for relief against unfair competition is that given against one palming off his goods as those of another.[1] But Wentling does not sell Sunbeam's razor's as Wentling's; he sells Sunbeam's razors as Sunbeam's.[2] There is no deception or palming off. Sunbeam says that if Wentling wants to sell its razors below the established price he should take off the identifying trade-

1 See Restatement of Torts, §§ 712, 717.

2 Which, according to the RESTATEMENT OF TORTS, § 736, he has an affirmative right to do.

mark. Suppose he did. He certainly could not put on his own mark and sell Sunbeam razors as his, Wentling's. And if he sold them with no mark at all but just as "good electric razors" could not Sunbeam, on the very argument it makes here, complain that Wentling was interfering with its trade-mark by not allowing the customer to know that the good razor which he buys from Wentling is in fact made by Sunbeam? If Sunbeam's argument made to us is sound, we do not see why the other conclusion would not follow. Yet this is the very thing which the Supreme Court, and others, have said Wentling could do.[3]

It would, indeed, be a remarkable result to reach in a competitive economy if we were to say that a manufacturer could make everyone submit to the price he imposes upon sales to the consumer. Even a contract to maintain prices was unlawful prior to the Millard-Tydings amendment to the Sherman Act as the famous Dr. Miles and Hartman decisions show.[4] To the extent that a manufacturer can get the same result without contract because of some theory of trade-mark protection, competition at the retail level in the sale of trade-marked goods is obviously going to be very much lessened.

A patentee is given a monopoly by legal grant. But even a patentee, who can exclude everyone else from making his patented article, cannot control the price at which others

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3 *See*, Old Dearborn Co. v. Seagram Corp., 299 U.S. 183, 195, "Section 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases."
The Supreme Court has also held that one may use the manufacturer's trade-mark when he repacks and resells the trade-marked goods so long as he does not deceive the public thereby. Prestonettes, Inc. v. Coty, 264 U.S. 359 (1924). One may also use the trade-mark on the goods when they are sold second hand so long as he indicates clearly that they are "used" products. Champion Spark Plug Co. v. Sanders, etc., 331 U. S. 125 (1947). Moreover, one may buy trade-marked goods and use them in the manufacture of new products which may be advertised to show the use of trade-marked materials in them. Forstmann Woolen Co. v. J. W. Mays Co., 71 F. Supp. 459 (E.D.N.Y. 1947) and 89 F. Supp. 964 (E.D.N.Y. 1950). See also Restatement of Torts, §§ 736, 737.

4 Dr. Miles Medical Company v. John D. Park & Sons Company, 220 U.S. 373 (1911); John D. Park & Sons v. Hartman, 153 Fed. 24 (6th Cir. 1907).

may sell his articles to consumers.[5] The protection given to the owner of a trade-mark certainly should not be greater than that given to the holder of a legal monopoly, the patentee.

Our conclusion here is free from doubt. Sunbeam's rights under the fair trade act against a non-signer are shown by the decision in the Schwegmann case. There are no such rights. Sunbeam's rights against Wentling based on the common law of trade-mark protection are certainly to be recognized but they do not go so far as Sunbeam urges here. The injunction against Wentling must be dissolved.

Wentling put in a counter-claim in the trial court when this case was brought up. That counter-claim was dismissed without consideration because of the position taken with regard to Sunbeam's rights under the fair trade acts. The counter-claim is to be restored and Wentling given an opportunity to make what proof he can under it. We do not pass in any way upon the merits of his counter-claim.

The judgment of the District Court is reversed and the case remanded for further proceedings consistent with this opinion.

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5 See Bauer v. O'Donnell, 229 U.S. 1 (1913); Straus, *etc.*, R. H. Macy & Co. v. Victor Talking Machine Co., 243 U. S. 490 (1917); United States v. Univis Lens Co., Inc., 316 U. S. 241 (1942). A patentee may, however, fix by contract the price at which his licensees may sell the patented article. See Bement v. National Harrow Co., 186 U. S. 70 (1902) and United States v. General Electric Co., 272 U. S. 476 (1926).